UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	**Docket No. FIFRA-08-2006-0001**
4 Seasons Cooperative	)	
Respondent	)	

INITIAL DECISION

I. Background and Procedural History

This proceeding under Section 14(a)(1) of the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA" or "Act"), 7 U.S.C. § 136*l*(a)(1), was commenced on October 5, 2005, by the filing of a Complaint by the Technical Enforcement Program and Legal Enforcement Program, Office of Enforcement, Compliance and Environmental Justice, United States Environmental Protection Agency, Region VIII ("Complainant" or "EPA") charging 4 Seasons Cooperative ("Respondent" or "4 Seasons") with failure to file an annual pesticide production report as required under Section 12(a)(2)(L) of the Act, 7 U.S.C. § 136j(a)(2)(L). Specifically, the Complaint alleges that Respondent failed to submit a 2004 annual pesticide production report on or before March 1, 2005, for the pesticides produced at its Redfield, South Dakota facility. EPA proposed a civil penalty of $6,500.

Respondent, through counsel, filed an Answer on October 21, 2005, denying the alleged violation, objecting to the proposed penalty or indeed, any penalty and demanding a public hearing (Answer at 2). Respondent stated that effective January 31, 2005, it merged with Farmers Union Oil Company of Redfield and Doland ("Farmers Union") and assumed

all claims and accounts, debts, liabilities, and obligations of Farmer's Union (*id.* at 1). As a result of the merger, Mr. Joel Frohling became manager of Respondent's Redfield and Doland facilities (*id.*).[1] Among the obligations assumed was the obligation to file an annual pesticide production report showing pesticide production for the calendar year 2004. The report was due on or before March 1, 2005, in accordance with 40 C.F.R. § 167.85(b). Although the address of Farmers Union Oil Company of Redfield and Doland was Redfield, South Dakota, Mr. Frohling apparently elected to manage operations from the Doland, South Dakota facility.[2] According to 4 Seasons, Mr. Frohling was left with a pile of papers from the previous manager, including EPA Form 3540-16, Pesticide Report for Pesticide- Producing and Device- Producing Establishments (*id.*). Uncertain as to how to fill out the document, Mr. Frohling claimed to have telephoned the EPA for instructions (*id.)*. In the original Answer, Respondent alleges that Mr. Frohling, based on the information provided by EPA, prepared separate forms ("Pesticide Production Reports") for the Redfield and Doland facilities and mailed the completed Reports to EPA in Denver, Colorado on or about February 17, 2005 (Answer, Exhibits "Exhs" A and B).[3] Each Report, however, lists the company name as "4 Seasons Coop," the address as Box 386, Doland, South Dakota and the EPA

[1] It is of interest that a Mr. Lance Frohling, uncle to Joel Frohling, is the manager of Respondent's Redfield facility. *See* Voluntary Statement of Lance Frohling taken by Mr. Chuck Tollefson, an inspector of the South Dakota Department of Agriculture, at the time of an inspection of 4 Seasons' Redfield facility on September 15, 2005 (Bulk Pesticide Repackaging Inspection Report for 4 Seasons Cooperative, Redfield, South Dakota, C's Exhibit "CX" 5 at 16). Mr. Frohling's statement provides: "The bulk pesticide report submitted to the EPA had both Doland and Redfield's products on the same report. Touchdown CF, Touchdown IQ and G-Max Lite are Redfield bulk products."

[2] Mr. Tollefson (identified, supra note 1) prepared a Bulk Pesticide Repackaging Inspection Report of his inspection of 4 Season's Redfield facility on September 15, 2005 (CX 5). The Report indicates that when he asked Mr. Lance Frohling for a copy of the annual report submitted to EPA (Form 3540-16), it was determined, after much searching and telephone calls to the main manager, Joel Frohling at the Doland, South Dakota facility, that products repackaged at the Redfield, South Dakota facility were combined with the Doland repack report.

[3] Exhibit A is allegedly the Pesticide Production Report applicable to the Redfield facility while Exhibit B is the Report allegedly applicable to the Doland facility.

Establishment No. as 056106-SD-001, which is the establishment number for Respondent's Doland, South Dakota facility. The EPA establishment number for Respondent's Redfield facility is 056902-SD-001 (C's Exhibit "CX" 14). Examination of these Reports reveals no obvious indication that either was intended to report pesticide production at Respondent's Redfield facility. A worksheet (RX D), which Mr. Frohling allegedly used in preparing the Pesticide Production Reports (RX B and C), supports Respondent's claim that its reported production activities included repackaging activities at its Redfield facility.[4] Therefore, Respondent argues that it has substantially complied with EPA's reporting rules and that the Complaint should be dismissed.

As indicated supra, 4 Seasons merged with Farmers Union Oil Company of Redfield and Doland, effective January 31, 2005. 4 Seasons assumed all claims, accounts, debts, liabilities, and obligations of Farmers Union as of the effective date of the agreement (Unification Agreement, CX 4). Respondent is a pesticide producer incorporated in the State of South Dakota (Complaint at 3). Currently, Respondent operates a facility located at 25 East 6th Avenue, Redfield, South Dakota ("Redfield Facility") and another facility in Doland, South Dakota[5] ("Doland Facility"). Both parties have filed prehearing exchanges.

On March 1, 2006, Complainant filed [a] Motion for Findings of Fact and Conclusions of Law and [a] Motion for Accelerated Decision as to Liability and a Memorandum in support

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[4] Although a Pesticide Production Report for the Redfield facility for 2003 is in the record (CX 10), production quantities have been redacted for CBI concerns and production quantities for 2003 may not be compared with those on the report which allegedly shows pesticide production at the Redfield facility in 2004.

[5] Other than simply Main Street, a street address for the Doland Facility has not been provided. However, the Pesticide Production Reports submitted by 4 Seasons (RX B and C) reflect that the mailing address is Box 386, Doland, South Dakota, 57436.

thereof ("Motion") pursuant to 40 C.F.R. §§ 22.16(a) and 22.20(a). EPA stated that 4 Seasons was required by statute (7 U.S.C. § 136e(c)(1)) and regulation (40 C.F.R. § 167.85) to file a report of pesticides produced at each facility during the preceding year. Annual reports are required to be submitted on or before March 1st of the succeeding year (40 C.F.R. § 167.85(d)). 4 Seasons filed an Objection to Complainant's Motion for Findings of Fact and Conclusions of Law and Complainant's Motion for Accelerated Decision As to Liability ("Objection") under date of March 8, 2006. Respondent argued that there were genuine issues of material fact, specifically Proposed Finding of Fact No. 9 stated that Respondent did not file a 2004 Pesticide Report for Pesticide Producing Establishments, EPA Form 3540-16, for its Redfield facility. On March 22, 2006, Complainant replied to 4 Seasons' Objection to its Motion, reiterating that there are no genuine issues of material fact remaining in this case, and requesting the Administrative Law Judge ("ALJ") issue an accelerated decision as to liability and adopt the proposed findings of fact and conclusions of law set forth in its Motion. Complainant asserts that the Objection challenged only EPA's Proposed Finding of Fact No. 9 and since all other findings of fact and conclusions of law in its Motion were unopposed, its Motion should be granted (*id.* at 1-2). Further, Complainant contends that Respondent did not raise any new facts or issues (*id*).

By order dated April 17, 2006, the ALJ denied Complainant's Motion ("Order"). The ALJ found evidence from Respondent stating that Mr. Frohling prepared separate reports for the Redfield and Doland facilities according to Respondent's Answer, which was also highlighted in its Objection to Complainant's Motion, but that was contrasted with reference to a single two-page report mailed to the EPA Regional Office in Denver, Colorado (Order at 5). Even though the submitted report(s) contained no apparent indication that pesticide

production at the Redfield facility was included, the ALJ found that evidence needed to be fully developed at a hearing (*id*.).

Pursuant to Section 14 of FIFRA, 7 U.S.C. § 136*l*, a hearing was held in Aberdeen, South Dakota on July 20, 2006. Respondent and Complainant filed their initial post-hearing brief along with its proposed findings of fact and conclusions of law on September 28, 2006 and September 29, 2006, respectively. Along with Respondent's brief was a Motion to Amend [the] Answer to Conform with [the] Evidence ("Motion to Amend"). Here, Respondent, through its attorney, claims that paragraph 5 of its Answer should be amended to read that "Mr. Frohling prepared *one form for both the Redfield and Doland facilities* (Motion to Amend at 1). In its original answer, Respondent claimed that Mr. Frohling prepared separate forms for the Redfield and Doland facilities (*id*.). Yet, during the hearing, Mr. Frohling testified that two sheets, not two reports were mailed to EPA and testified that he disagreed with paragraph 5 of the Answer that he prepared separate forms (*id*.).

Complainant filed its Response to Respondent's Motion to Amend ("Response") under date of October 13, 2006. EPA does not oppose Respondent's Motion to Amend, but requests leave to brief the issues because Respondent's Amended Answer would result in an additional violation of 40 C.F.R. § 167.85(b)[6] and Section 7(c) of FIFRA, 7 U.S.C. § 136e (Response at 1). According to Section 167.85(b), "the report shall only include those pesticidal products actually produced *at the reporting establishment*" (40 C.F.R. § 167.85(b)

[6] "(b) *Information required*. The pesticide report shall include the following: (1) Name and address of the establishment; (2) amount of each pesticidal product: (i) Produced during the past year; (ii) sold or distributed during the past year; (iii) estimated to be produced during the current year. The report shall only include those pesticidal products actually produced at the reporting establishment. Reports submitted by foreign-producing establishments shall cover only those pesticidal products exported to the United States." 40 C.F.R. § 167.85(b).

(emphasis added). Complainant did not move to amend its Complaint, but claims Respondent violated FIFRA by failing to submit a pesticide production report, EPA Form 3540-16, for the Redfield facility and thereby concluding that the pesticide production report for the Doland facility "is false and misleading, adding to the gravity of Respondent's self admitted actions" because it contains pesticidal products not produced at its facility but rather at the Redfield facility (*id*. at 2). EPA requests the ALJ to consider the new violation when evaluating the gravity of the violation. EPA further contends that Mr. Frohling's "miscommunication" with his lawyer regarding how many reports were submitted only affirms that his testimony, in general, is unreliable (*id*. at 2-3).

Respondent neither filed a reply to Complainant's response nor did it respond to EPA's Motion for Leave to Brief the Issues Raised by the Amended Answer. On October 30, 2006, Respondent filed its Response to Complainant's Brief in Support of Proposed Findings of Fact, Conclusions of Law and Complainant filed its Reply Brief on October 27, 2006. However, both address the circumstances pertaining to whether or not Respondent violated FIFRA and its regulations.

II. Findings of Facts

1. Respondent, 4 Seasons Cooperative, is a cooperative association incorporated in the state of South Dakota.
2. Respondent merged with Farmers Union Oil effective January 31, 2005.
3. As part of the merger agreement, Respondent assumed all of Farmers Union's liabilities and obligations.

4. Farmers Union had two pesticide producing establishments, one at 25 East 6th Ave, Redfield, South Dakota and one in Doland, South Dakota.
5. The registered pesticides Touchdown CF, Touchdown IQ, and G-max Lite are repackaged or produced at the Redfield establishment.
6. Respondent's Redfield facility is registered with the EPA (EPA Est. No. 056902-SD-001), separately from its Doland pesticide producing establishment (EPA Est. No. 056106-SD-001) as a pesticide producing establishment.
7. The Record reflects that Respondent filed a 2004 Pesticide Report for Pesticide Producing Establishments, EPA Form 3540-16, for the Doland (EPA Est. No. 056106-SD-001), South Dakota establishment dated February 17, 2005.
8. Joel Frohling made a good faith effort to comply with the requirements of FIFRA § 7(c)(1), and 40 C.F.R. § 167.85 to submit a 2004 pesticide report for the Doland and Redfield establishments.
9. Respondent did not file a 2004 Pesticide Report for Pesticide Producing Establishments, EPA Form 3540-16 for the Redfield (EPA Est. No. 056902-SD-001) Establishment, South Dakota.
10. A narrative, prepared by Tim Osag, Senior Enforcement Coordinator, U.S. EPA, Region 8, who calculated the proposed penalty, is in the record (CX 18). Mr. Osag determined the penalty in accordance with the civil penalty matrix in the ERP.[7]

[7] The ERP details a five step process by which a penalty amount may be determined. These steps are:
(1) determination of the gravity, or "level" of the violation using Appendix A of the 1990 ERP;
(2) determination of the size of business category for the violator, found in Table 2;
(3) use of the FIFRA civil penalty matrices found in Table 1 to determine the dollar amount associated with the gravity level of violation and the size of business category of the violator;
(4) further gravity adjustments of the base penalty in consideration of the specific characteristics of the pesticide involved, the actual or potential harm to human health and/or the environment, the

III. Conclusions

1. EPA has jurisdiction over this matter pursuant to section 14(a)(1) of FIFRA, 7 U.S.C. § 136l(a)(1).
2. Respondent is a "person" within the meaning of section 2(s) of FIFRA, 7 U.S.C. § 136(a).
3. Respondent, 4 Seasons, is a registered pesticide "producer" as defined by section 2(w) of FIFRA.
4. As a registered pesticide producer, 4 Seasons was obligated by FIFRA § 7(c)(1), and 40 C.F.R. § 167.85 to submit a pesticide report on forms supplied by the Environmental Protection Agency on or before March 1, covering pesticide activities at each establishment during the prior calendar year.
5. As part of the information required in each annual pesticide producing report, Respondent is required to submit an annual pesticide report that shall only include those pesticidal products actually produced at the reporting establishment.
6. Respondent's Redfield facility and Doland facility are separate establishments, and as such, must submit separate annual pesticide producing reports.
7. Respondent failed to file the 2004 annual pesticide production report for its Redfield establishment (EPA Est. No. 056902-SD-001) in violation of section 12(a)(2)(L) of FIFRA, 7 U.S.C. § 136j(a)(2)(L).

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compliance history of the violator, and the culpability of the violator, using the "Gravity Adjustment Criteria" found in Appendix B; and

(5) consideration of the effect that payment of the total civil penalty will have on the violator's ability to continue in business, in accordance with the criteria established in the ERP. (ERP at 18).

8. Under Section 14(a)(1) of FIFRA, 7 U.S.C. § 136l(a)(1), Respondent's violation of Section 12(a)(2)(L), 7 U.S.C. § 136j(a)(2)(L), renders it subject to civil penalties not to exceed $6,500 per violation.

9. In calculating the proposed penalty of $6,500, Complainant utilized the 1990 Enforcement Response Policy for the Federal Insecticide, Fungicide and Rodenticide Act (ERP). Although the ERP will be followed to the extent it provides through the1986 ERP that the remedy for failure to file an annual pesticide production report for an establishment is a penalty rather than a warning under FIFRA § 14(a)(4), it is concluded that the penalty calculated by Complainant overstates the gravity of the violation both from the standpoint of harm to the regulatory program and gravity of the misconduct. It is concluded that the ERP will be disregarded in determining the penalty for the violation herein found as the Court is permitted to do by Consolidated Rule 22.27(b) (40 C.F.R. Part 22) and that an appropriate penalty is the sum of $1,000.

IV. Discussion

Motion to Amend

Under the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Consolidated Rules of Practice"), found at 40 C.F.R. Part 22, a respondent may amend the answer to the complaint if the Administrative Law Judge grants such a motion (40 C.F.R. §22.15(e)).[8] While the Federal Rules of Civil Procedure ("FRCP") are not binding on administrative agencies, the FRCP provides guidance (*In the Matter of CVS Corp.*, Docket No. CAA-05-

[8] According to 40 C.F.R. § 22.15(e), "[t]he respondent may amend the answer to the complaint upon motion granted by the Presiding Officer."

2002-0007, 2002 EPA ALJ LEXIS 71, *3,n1 (2002) *citing Oak Tree Farm Dairy, Inc. v. Block*, 544 F. Supp. 1351, 1356 n3 (E.D.N.Y. 1982)). Liberal amendment of pleadings has been adopted by the federal courts pursuant to Fed. R. Civ. P. § 15(a)[9] and approved by the Environmental Appeals Board ("EAB") for administrative penalty proceedings. *See In re Lazarus, Inc.*, 7 E.A.D. 318, 333 (EAB 1997); *Port of Oakland and Great Lakes Dredge and Dock Co.*, 4 E.A.D. 170, 205 (EAB 1997) *In the Matter of Overcash Gravel and Grading Co., Inc.*, Docket No. CWA-04-2004-4530, 2005 EPA ALJ LEXIS 40, *1 (2005); *see also In the Matter of Jerry L. Korn and Dairy Health*, Docket No. FIFRA 10-2000-0061, 2001 EPA ALJ LEXIS 33, *6 (2001) *citing Asbestos Specialists, Inc.*, 4 E.A.D. 819, 827-830 (EAB 1993). Even the Supreme Court has interpreted FRCP 15(a) as providing the court authority to permit amendments to pleadings (*see Foman v. Davis*, 371 U.S. 178 (1962)). While the authority may be broad, denial is permitted when undue delay, bad faith or dilatory motive on the part of the movant . . . and undue prejudice to the opposing party . . . ." *Foman v. Davis*, 371 U.S. 178, 181-82 (1962).

As indicated *supra*, Respondent originally denied failing to file an annual pesticidal products report (EPA Form 3540-16) for the Redfield facility in its Answer. However, it is now argued that upon Mr. Frohling calling EPA personnel in Pierre, South Dakota or Denver, Colorado, he was told to prepare one form for both facilities. EPA contends that FIFRA is a "strict liability" statute and Respondent is liable regardless of whom Mr. Frohling spoke with

[9] "(a) Amendments. A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders." Fed. R. Civ. P. 15(a).

someone at EPA or not. These answers will be further discussed in the ALJ's initial decision and will not be concluded now.

While it may be argued that Respondent's Motion to Amend the Answer may cause prejudice to the opposing party or find Respondent to be acting in bad faith when seeking to withdraw its admission, the ALJ may take that into consideration when deciding the gravity of the penalty (*see In the Matter of Department of Defense Davis-Monthan Air Force Base*, Docket No. CAA-09-98-17, 2000 EPA ALJ LEXIS 14, *1,n1 (2000)). Complainant alleges that Respondent is in further violation of FIFRA and advises the Court that this new violation goes to the gravity of the penalty. However, since Complainant does not oppose the Motion, the Court finds that granting the Motions will help to clarify the issues within the case. Accordingly, Respondent's Motion to Amend the Answer is granted.

Complaint

Respondent's Argument

Respondent has two main arguments: (1) Respondent argues that it "substantially complied" with the requirements of FIFRA in combining two pesticide production reports into one report, as the entire volume of pesticide located at both the Doland and Redfield facilities was reported to the EPA; and therefore equity requires the complaint to be dismissed as Joel Frohling, the manager of the facilities, took "prudent and reasonable" steps in attempting to comply with FIFRA; (2) Respondent should not be penalized for erroneous advice given to it by EPA (Resp. Brief at 10).

Mr. Joel Frohling was hired by Respondent to serve as the manger of the Redfield-Doland operation (Tr. 84). Prior to holding this position, Joel Frohling had managed

Cooperative Agronomy Services of Groton, South Dakota, where he had no responsibility for preparing or filing pesticide reports with EPA (Tr. 85). Therefore, Respondent contends that Joel Frohling had no familiarity with the forms and procedures required by EPA (Resp. Brief at 2). When Joel Frohling arrived at Doland, he found the accumulation of several months of mail (Tr. 87). Among the mail he found an EPA Report Form 3540-16 required for 2004 and containing a label designating it as the proper form for the Doland facility (Tr. 22). Joel Frohling testified that he found no such form for the Redfield facility (Tr. 88).

Joel Frohling testified that he read the instructions which accompanied the Doland facility report form (Tr. 99). He then testified that he "made a phone call. And I did not document who I talked to, but asked if I could put it all in one report or if I should make copies of the reports that I had and just write Redfield in. And I was told don't do that, it will just confuse the matter; just put it all in one report; as long as you're report it, it will be fine." So that's what I did. I combined everything, put it on the report, and mailed it off" (Tr. 89). Joel Frohling was unable to remember who he talked to, but testified that his notes indicate that he called the Denver regional office (Tr. 89). Joel Frohling therefore combined the pesticide information from both the Redfield and Doland facilities and included it in the Doland facility report form which he submitted to the EPA (Tr. 89).

Respondent argues that Joel Frohling substantially complied with the regulation by providing all of the information on one form. Respondent also contends that Joel Frohling reasonably relied on the advice he received from EPA (Resp. Br. 9). Respondent contends that Joel Frohling's "motives and intentions were to follow the law and EPA regulations. Absolutely no benefit or cost savings resulted" (Resp. Br. 9).

Complainant's Argument

Complainant argues that FIFRA is a strict liability statue designed to protect the public and the environment from the dangers of pesticides. Respondent did not comply with the FIFRA requirement to file the required report for its Redfield establishment. Complainant contends that Respondent cannot deny liability because of its supposed reliance on an unsubstantiated call. Instead, Respondent should have followed the instructions for reporting contained in the reporting form, the reminder for the reporting form, the rule and the statute itself (Compl. Brief 4). Complainant contends that Joel Frohling could have downloaded an extra reporting form from the internet and filed that form for the Redfield establishment (Tr. 100, Compl. Brief 5).

Discussion

As a pesticide producer, Respondent is subject to regulation under 40 C.F.R. § 167.85. Respondent is required to provide a pesticide production report, EPA Form 3540-16, of the preceding calendar year for each of its reporting establishments. The regulations clearly provide that the contents of such report "shall only include those pesticidal products actually produced at the reporting establishment." 40 C.F.R. § 167.85(b). The regulations make it clear that 4 Seasons was required to submit a separate annual pesticide production report for its Redfield establishment in a manner that complies with FIFRA and its implementing regulations. Failure to do so is a violation of FIFRA.

Respondent's first argument of "substantial compliance" is not valid. While Respondent has stated that there was no intent to violate FIFRA regulations, intent is not a necessary element for a finding of liability here. FIFRA has been consistently construed as

imposing strict liability for failure to meet the statute's requirements. *In re Green Thumb Nursery, Inc,*. FIFRA Appeal No. 95-4a 6, E.A.D. 782, 796, 1997 EPA App. Lexis 4, 36 (1997). "If a statute or regulation requires the filing of specific information in a specific form, that requirement is not satisfied by filing something significantly different" (*Id.* at 41). Accordingly, Respondent's argument of substantial compliance has no merit.

"Failure to properly register a pesticide product is not harmless or insignificant" (*Id.* at 44). Mr. Osag explained during his testimony that the information provided by the pesticide production reports is used for identifying the locations where certain pesticides are being sold, for tracking pesticides, identify problems with pesticides, to issuing stop sales orders, or work with a company for product recalls (Tr. 49-50). Mr. Osag testified that EPA relies on the accuracy of the information submitted by producers and that inaccurate information undercuts the usefulness of the system (Tr. 50).

Respondent fails to prevail on its second argument of equitable estoppel. In order to prevail on an equitable estoppel argument, Respondent "must show a misrepresentation by the government, which it reasonably relied upon, to its detriment, together with a showing of affirmative misconduct." *In the Matter of Jehovah-Jireh Corp.,* Docket No. CWA 5-99-016, 2001 EPA ALJ Lexis 42, 16 (ALJ July 25, 2001). In the case at hand, Respondent's claim that an EPA employee who instructed Joel Frohling to combine two pesticide production reports in one form constitutes misrepresentation by the government. However, Joel Frohling's testimony that he spoke to an EPA employee is weakened by the absence of supporting testimony and evidence. Under questioning by EPA counsel, Joel Frohling admitted that he was not even sure where he called, stating, "I know I called and talked to somebody in Pierre or in Denver" (Tr. 117). EPA Region 8 is located in Denver, Colorado,

while the South Dakota Department of Agriculture is located in Pierre, South Dakota. It is therefore questionable as to whether an EPA employee or a state Department of Agriculture employee was contacted. While Respondent was unable to present any evidence as to the date of the call, the name of the person Joel Frohling spoke to, or a telephone record of the call, the Court has no reason to doubt Joel Frohling's testimony that he spoke to someone about the pesticide production forms.

Even if Joel Frohling's testimony is taken as true, Respondent's defense of estoppel would still fail. Estoppel against the United States occurs in "only the most extraordinary circumstances." *United States v. Smithfield Foods, Inc.* 965 F.Supp. 769, 790 (E.D. Va 1997). This is because of the special interest in the Government enforcing its laws. "When the Government is unable to enforce the law because the conduct of its agents has given rise to an estoppel, the interest of the citizenry as a whole in obedience to the rule of law is undermined. It is for this reason that it is well settled that the Government may not be estopped on the same terms as any other litigant." *Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51, 60 (1984).

Regardless of what Joel Frohling understood, or relied upon, noncompliance with TSCA regulations is a violation of the law. Joel Frohling was expected to know the law, and "may not rely on the conduct of government agents to the contrary." *Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51, 63 (1984). Following this concept, and similar to the case at hand, in *U.S. v. CPS Chemical*, the company relied upon the representations of the EPA and made permit modifications. The federal district court rejected CPS Chemical's estoppel argument, and ruled that regardless of any statements made by EPA agents or employees, noncompliance with the effluent limitations is a violation of the law.

U.S. v. CPS Chemical, 779 F. Supp. 437, 452-453 (E.D. Ark. 1991). Based on the provisions of the Act and regulation (40 C.F.R. § 167.85), Respondent was on notice of requirement to file separate pesticide production reports for each establishment, and by failing to do so, was in violation of the Act. Therefore, the EPA is not estopped from enforcing the Act. However, the actions by Respondent may be considered in regards to the penalty.

V.Determination of Civil Penalty

Having found that Respondent violated FIFRA Section 14(a)(1), the Court now determines the appropriate civil penalty to be assessed against Respondent. Complainant has proposed the maximum penalty for a single day violation under FIFRA, $6,500.[10] However, the regulations governing this proceeding give the Court the discretion "to assess a penalty different in amount from the penalty recommended to be assessed in the complaint, [so long as the Court] set[s] forth in the initial decision the specific reasons for the increase or decrease." 40 C.F.R. § 22.27(b). And although the Court must "consider" any penalty guidelines, it is not bound by them. *Id.*[11]

FIFRA § 14(a)(4) provides in pertinent part that: In determining the amount of the penalty, the Administrator shall consider the appropriateness of such penalty to the size of the business of the person charged, the effect [of the penalty] on the person's ability to continue in business, and the gravity of the violation.

Complainant determined the proposed penalty in accordance with the Enforcement Response Policy for FIFRA (July 2, 1990) (ERP) (CX 22). Complainant first identified the

[10] The penalty amounts shown in the 1990 Civil Penalty Matrix were increased by 10% effective January 31, 1997 and again by 17.23% effective March 15, 2004, pursuant to the Debt Collection Improvement Act of 1996.
[11] In this case, the applicable guidelines are the Revised FIFRA Enforcement Respondent Policy, issued on July 2, 1990.

gravity of the offense using Appendix A of the ERP. Appendix A identifies a violation of FIFRA Section 7(c) as gravity level 2. Mr. Osag testified at the hearing that the EPA considers violations of the Section 7(c) reporting requirement to be serious, because the EPA depends on the data reports for many of the decisions, actions and inspection activities that are undertaken by the EPA. The failure of companies to comply with the reporting requirements undercuts the ability of the Agency to accomplish its goals (Tr. 48).

Second, Complainant determined the size of business category for the respondent. The penalty for 4 Seasons has been calculated using the Category I size of business with the understanding that this proposed penalty would be recalculated if information became available that shows this assumption to be incorrect. No new information was introduced at hearing to affect this calculation. Mr. Osag testified at the hearing that 4 Seasons is a business with gross sales greater than $1 million, based on Dun & Bradstreet reports (Tr. 46). Respondent did not make an inability to pay defense.

Third, Complainant used the above gravity and size of business components and the Civil Penalty Matrix for FIFRA Section 14(a)(1) Violations on page 19 of the 1990 Policy to determine the dollar amount of the proposed penalty. Violations with gravity level 2 and in Business Category I are assessed a penalty of $6,500 for each violation.

The Court has to consider what effect the penalty would have on Respondent's ability to stay in business. According to the Dun & Bradstreet reports submitted by Complainant in Exhibits 16 and 17, Respondent has gross sales in excess of $37 million. Therefore, it is this Court's assessment that a penalty of $6,500 is unlikely to have any effect on Respondent's ability to continue in business.

Finally, the Penalty Policy then directs that the actual circumstances of the violation be considered using the gravity adjustments criteria listed in Appendix B. The penalty amount determined from the matrix and can be adjusted either upward or downward depending on the specific facts of the case. However, the 1990 Policy states that due to the gravity of record keeping and reporting violations, the gravity adjustment factors[12] are not to be used. "This elevates reporting violations over what on their face are more serious violations, but for which gravity adjustments are nevertheless provided." In the Matter of Four Star Feed and Chemical, Docket No. FIFRA 06-2003-0318, at 12 (ALJ July 21, 2004).

In James C. Lin and Lin Cubing, Inc., the Environmental Appeals Board ("EAB") reduced the penalty for each of seven counts of application of restricted use pesticides by an applicator who was not certified from $4,000 to $1,000, even though prima facie these were serious violations and the penalty was calculated in accordance with the ERP, based on the EAB's conclusion that the gravity of the violation was overstated. In reducing the penalty proposed by Complainant, the EAB noted that the ALJ found that the violation was not intentional. James C. Lin and Lin Cubing, Inc., FIFRA Appeal No. 94-2, 5 E.A.D. 595 (EAB 1994).

The same conclusion is applicable here in 4 Seasons, where the record shows that the failure to submit the pesticide report for the calendar year 2004 was simply inadvertent. Respondent made a good faith attempt to file the pesticide report as required by the regulations, but failed to do so properly. The record shows that the actual pesticide production quantities for both Redfield and Doland were included in report received by EPA, simply absent an indication in the report itself that it included information from the Redfield

[12] These factors include the toxicity of the pesticide, the effects of its misuse on human health and the environment, culpability of the company, and compliance history (Tr. 47).

establishment. In the past, the EAB has reduced the proposed penalty in cases where the record shows the violator made a good faith effort to comply with the appropriate regulations. Pacific Refining Company, TSCA Appeal No. 94-1, 5 E.A.D. 520, 527 (EAB 1994); *see also* Johnson Pacific, Inc., FIFRA Appeal No. 93-4, 5. E.A.D. 696 (EAB 1995) (accepting the Presiding Officer's penalty assessment while noting fairness and equity are appropriate considerations in assessing civil penalties under FIFRA).

In light of Respondent's good faith attempt to file, it is concluded that the penalty computed in accordance with the ERP by Complainant overstates both the gravity of the harm (or the potential for harm) resulting from the violation and the gravity of the misconduct. Under the circumstances present in this matter, assessment of a penalty in accordance with the ERP, as proposed by Complainant, would be punitive rather than remedial. Accordingly, the ERP will be disregarded in determining an appropriate penalty as permitted by Consolidated Rule 22.27(b). The Court concludes that that a penalty substantially less than that sought will amply compensate for any harm to the regulatory program and deter future violations by 4 Seasons Cooperative and any firms similarly situated. *See* In the Matter of Hoven Co-op Service Company, Docket No. FIFRA-8-99-31 at 24 (ALJ Feb. 20, 2001).

It is concluded that an appropriate penalty is the sum of $1,000, which will be assessed.

ORDER

The violation of FIFRA § 7(c) alleged in the complaint having been established, 4 Seasons is assessed a civil penalty of $1,000 for the single violation, pursuant to Section 14 of

FIFRA, 7 U.S.C. § 1361.[13] Payment shall be made by submitting a certified or cashier's check in the amount of $1,000, payable to "Treasurer, United States of America," and mailed to:

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, MO 63197-9000

A transmittal letter identifying the subject case and EPA docket number as well as Respondent's name and address, must accompany the check.

If Respondent fails to pay the penalty within the prescribed statutory period after entry of this Order, interest on the penalty may be assessed. *See* 31 U.S.C. § 3717; 40 C.F.R. § 13.11.

Dated this _____25th_____ day of January, 2008.

_____
Spencer T. Nissen
Administrative Law Judge

[13] Unless appealed to the Environmental Appeals Board (EAB) in accordance with Rule 22.30 (40 C.F.R. Part 22), or unless the EAB elects to review this decision *sua sponte* as therein provided, this decision will become a final order in accordance with Rule 22.27(c).